



September 10, 2015

Chairwoman Virginia Foxx
U.S. House Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Training
2181 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Ruben Hinojosa
U.S. House Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Training
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: Preventing and Responding to Sexual Assault on Campus

Dear Chairwoman Foxx, Ranking Member Hinojosa, and honorable members of the Committee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address the issue of sexual assault on campus. To supplement the oral testimony I provided at today's hearing, below please find a detailed overview of FIRE's concerns regarding the adjudication of allegations of sexual assault on campus and our analysis of relevant legislation pending in Congress.

I. Solutions Must Take the Rights of All Students Into Account

As we explained in our Comment to the White House Task Force to Protect Students From Sexual Assault ("Task Force"), due process rights are one of FIRE's core concerns. *See* Attachment A. While there is no doubt that institutions of higher education are both legally and morally obligated to effectively respond to known instances of sexual assault, public institutions are also required by the Constitution to provide meaningful due process to the accused. *Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). FIRE has long maintained that these two responsibilities need not be in tension.

As I am sure each of the members of the Committee would agree, access to higher education is critical—especially in today’s economy, where a college degree is so often a requirement for career advancement. Given the high stakes for both the accusers and the accused in campus sexual assault disciplinary hearings, it should be beyond question that neither student’s educational opportunities should be cut short unjustly. Just as it is morally wrong and unlawful for a college to sweep allegations of sexual assault under the carpet, it is also inexcusable both ethically and legally to expel an accused student after a hearing that provides inadequate procedural safeguards. As recent news reports have demonstrated all too well, both of these regrettable outcomes occur at campuses across the country with alarming frequency. *See Attachment B.*

Institutions adjudicating guilt or innocence in sexual assault cases must do so in a fair and impartial manner that is reasonably calculated to reach the truth. This should be self-evident. Indeed, in the April 4, 2011, “Dear Colleague” letter issued by the Department of Education’s Office for Civil Rights (OCR), the agency acknowledged that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.”

Disappointingly, however, OCR’s own rhetoric and actions have been decidedly one-sided, emphasizing the rights of the complainant while paying insufficient attention to the rights of the accused. For example, OCR has mandated that institutions utilize our judiciary’s lowest burden of proof, the “preponderance of the evidence” standard, despite the absence of any of the fundamental procedural safeguards found in the civil courts of law from which that standard comes. Without the basic procedural protections that courts use (like rules of evidence, discovery, trained legal advocates, the right to cross-examine witnesses, and so forth), campus tribunals are making life-altering findings using a low evidentiary threshold that amounts to little more than a hunch that one side is right. This mandate is not just unfair to the accused—it reduces the accuracy and reliability of the findings and compromises the integrity of the system as a whole.

Perhaps predictably, OCR’s lopsided focus has had negative consequences for the rights of accused students in sexual assault adjudications conducted in recent years. As the partners of the National Center for Higher Education Risk Management (NCHERM) stated in a May 2014 open letter: “We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence — or the lack thereof — because they think they are supposed to, and that doing so is what OCR wants.” *See Attachment C.* NCHERM’s statement was remarkable not only because of the organization’s extensive client list—per the group’s website, it currently provides legal services to over 65 colleges and universities and consulting services to thousands of clients—but also because Brett Sokolow, NCHERM’s founder, President, and Chief Executive Officer, has been an outspoken proponent of federal involvement in campus sexual assault adjudication, describing himself as an “activist” for victims’ rights. In other words, OCR’s mandates have had such a negative effect on campus justice that even outspoken proponents of those mandates are voicing serious concern.

Critics may have legitimate grievances with the way campus tribunals have often treated accusers. But exchanging institutional disregard for accusers for an institutional disregard for the accused is not an acceptable outcome and does not advance justice. FIRE is hopeful that the Education and Workforce Committee will tackle this important issue in a way that addresses the needs of all students.

II. Concerns about Institutional Competency

Thus far, a great deal of the discussion about how to best address sexual assaults on college campuses has accepted the premise that university administrators are qualified to serve as fact-finders and adjudicators. But if there is one thing that all sides of this issue agree on, it is this: Few, if any, schools have demonstrated the competence necessary to capably respond to the problem of sexual assault on campus. Too many campus administrators inject their biases into the process, while the rest, despite often trying their best, simply lack the necessary expertise or proper tools. This is the reality of the current system. It is very difficult to craft legislative remedies to the basic problems presented by entrusting the adjudication of allegations of serious criminal misconduct to a campus judicial system that was not intended to handle serious crimes and which will never have the appropriate tools or resources to do so. The current arrangement benefits no one, and its readily apparent failures should lead us all to question the wisdom of doubling down on this broken system.

FIRE is not alone in our assessment that campus judiciaries are ill-equipped to adjudicate sexual assault cases. This concern was expressed eloquently by the Rape, Abuse and Incest National Network (RAINN) in its comment submitted to the White House Task Force:

It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.

See Attachment D, p. 9.

University of California system President Janet Napolitano recently expressed a similar sentiment in an article published in the *Yale Law & Policy Review*. She cautioned, “the federal government’s expectations, especially related to investigations and adjudication, seem better-suited to a law enforcement model rather than the complex, diversely populated community found on a modern American campus.”¹ On this point, she is right.

Campus disciplinary boards lack the ability to collect, hold, and interpret forensic evidence. They lack the ability to subpoena witnesses and evidence or even put under oath those who appear voluntarily. The parties typically lack the representation of experienced, qualified

¹ Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 398-99 (2015).

legal counsel, and they do not have the right to discovery. These proceedings are not governed by the rules of evidence and often disregard the right to confront adverse witnesses. The fact-finder—often a single investigator—decides whether there was a sexual assault under the low “preponderance of the evidence” standard. Put simply, expecting these tribunals to reach reliable, impartial, and just results is unrealistic.

Training requirements for the campus administrators (and sometimes even students and faculty) handling these cases are unlikely to sufficiently fix the core disjunction between the competencies of institutions of higher education and the grave responsibilities inherent in the adjudication of sexual assault allegations. Sexual assault allegations are often nuanced and complex, which is one of the reasons why they present challenges to even the trained professionals employed by our criminal justice system. As the NCHERM partners observed: “[T]he public and the media need to understand that campus [sexual assault] complaints are not as clear-cut as the survivors at [victims’ advocacy group] Know Your IX would have everyone believe.” *See* Attachment C.

Victims of sexual assault deserve justice. Justice can only be served by competent professionals. Instead of creating a parallel justice system staffed by inexperienced, partial, and unqualified campus administrators to adjudicate campus sexual assault, policymakers should instead take this opportunity to improve and expand the effectiveness and efficiency of our criminal justice system to ensure that it provides an appropriately thorough, prompt, and fair response to allegations of campus sexual assault. Professional law enforcement and courts have the benefit of years of expertise, forensics, and legal tools like subpoenas and sworn testimony that are not available to campus adjudicators. These resources should be brought to bear on campus.

The hurried rush to find the accused guilty described by NCHERM in its open letter was inevitable in the current legal environment, where the federal government has mandated low evidentiary standards, called into doubt accused students’ right to cross-examine their accusers, interchangeably used the terms “victims” and “complainants” in pre-hearing contexts, and actually instructed institutions that in some instances they may take “disciplinary action against the harasser” even “prior to the completion of the Title IX and Title IV investigation/resolution”—in other words, before anyone has actually been found responsible for the offense. The inescapable perception of a top-down federal bias against the accused is solidified by the fact that to the best of FIRE’s knowledge, OCR has yet to take corrective measures against any institution for lack of impartiality against the accused or to intervene on an accused student’s behalf in any of the civil rights lawsuits they have filed, despite numerous examples of colleges punishing accused students with little if any evidence and after using embarrassingly minimal procedural safeguards.

Again, the perception of bias on the part of OCR is having a real effect on the reliability of campus adjudication across the country. After all, when deciding a case under the preponderance of the evidence, even a light thumb on the scales of justice can affect the outcome. One disturbing example comes from Occidental College, where the institution expelled a male student after finding that the female student was incapacitated, despite a 24-minute-long text message conversation showing the complainant taking deliberate steps to sneak away from her friends and into the young man’s dorm room for the express purpose of having sex. In one text she asks him, “do you have a condom,” and then she messaged a friend, “I’mgoingtohave sex now” [sic]. It cannot be a coincidence that this

result arrived on the heels of OCR launching a Title IX investigation into Occidental's handling of sexual assault claims, demonstrating the real harm caused when institutions feel pressured to reach guilty findings. Indeed, FIRE's involvement in this issue was spurred by a case in which an accused college student, Caleb Warner, was found responsible for sexual assault by the University of North Dakota despite evidence that not only did not support his guilt, but that was sufficiently in Warner's favor as to cause local law enforcement to pursue his *accuser* for filing a false police report. *See* Attachment E.

Leaving the investigation and adjudication of sexual assault allegations to law enforcement professionals and our courts of law would reduce or eliminate the involvement of self-interested universities, thus producing a more fundamentally fair process for all involved. Campus adjudicators with real or perceived interests in securing certain judicial outcomes undermine the reliability of the process. Indeed, the importance of disinterested judicial review was emphasized by Senators Gillibrand and McCaskill in their efforts to transfer sexual assault hearings from the jurisdiction of military tribunals, which boast far more protective procedures than campus tribunals, to civilian courts.

Finally, college tribunals are an inadequate forum for addressing serious felonies. If complainants are reluctant to go to law enforcement, that problem must be addressed directly by working with law enforcement. Diverting sexual assault cases from the criminal justice system to campus courts is dangerous. The harshest sanction a university can impose on a rapist is expulsion. Campus courts are unequipped to provide either the necessary process due the accused or the punishment justice demands for the victim and society if the accused is found guilty. We must stop pretending that campus tribunals are adequate alternatives to criminal justice and prioritize referring complainants to law enforcement professionals, so we have the chance to remove dangerous criminals from our communities. We must stop circumventing the criminal justice system. Continuing to do so is dangerous.

III. Analysis of Pending Legislation

A. The Campus Accountability and Safety Act

The Campus Accountability and Safety Act (CASA) would continue to rely on campus judiciaries to reach factual determinations and punish those deemed responsible for committing these heinous crimes. While the bill will not alleviate the risk of unjust findings caused by assigning ill-equipped campus administrators the responsibility of adjudicating these important cases, it does offer some improvements over the status quo. CASA contains some provisions FIRE supports: It requires that institutions enter into agreements with local law enforcement agencies, and prohibits institutions from adjudicating cases against student athletes in special proceedings. Other provisions, however, require amendment.

Neutral Language

CASA treats the problem of addressing sexual assault on campus as a one-sided issue of supporting "victims," instead of protecting the rights of both complainants and the accused. The bill presumes the guilt of all accused students, referring to accusers as "victims" throughout the legislation, even when referring to them in the pre-adjudication context.

Failure to use neutral language that refers to accusers as “complainants” prior to adjudication signals to institutions that Congress does not value impartiality.

Unequal Assignment of University Resources

CASA would institutionalize inequality within sexual assault proceedings by providing substantial resources to complainants—for example, a “confidential advisor”—without providing similar resources to the accused. This imbalance is at odds with regulations implementing the reauthorization of the Violence Against Women Act (VAWA), which require colleges to provide “the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”² Additionally, OCR has interpreted Title IX’s implementing regulations to require that colleges allowing advisors to participate “at any stage of the proceedings ... must do so equally for both parties.”³ As OCR observes, “[a] balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.” FIRE supports CASA’s determination to provide resources to help complainants navigate the system, but urges Congress to provide similar resources to the accused.

Trauma-Informed Training for Fact-Finders

Adding to the imbalance, CASA mandates that university employees responsible for “resolving complaints of reported sex offenses or sexual misconduct policy violations” must receive training on “the effects of trauma, including the neurobiology of trauma.” While trauma-informed training may be appropriate for first responders and those conducting initial interviews, providing that training to campus adjudicators undermines the impartiality of the process. The bill should be amended to make clear that such training is not to be provided to fact-finders, who are supposed to be impartial.

Penalty Provision

CASA’s penalty provision allows colleges to be fined 1 percent of their operating budgets per violation. While we presume this provision was intended to provide a more realistically enforceable penalty than the current penalty structure under Title IX—which subjects institutions to a loss of all federal funding—this provision potentially *increases* penalties. Federal dollars are only one source of funding for institutions. So, for example, if the Department of Education finds more than 15 violations at an institution that receives 15 percent of its operating budget via federal funds, the potential penalty will be greater than it is under the current system. Indeed, OCR claimed to have found over 40 unique violations at the University of Montana in 2013.⁴ The penalty provision must be capped.

² Advisor of Choice (§ 668.46(k)(2)(iii) and (iv)), 79 Fed. Reg. 62773 (Oct. 20, 2014).

³ DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁴ Joseph Cohn, *Legislative Rush on Campus Sexual Assault Threatens Student Rights*, THE TORCH (Sept. 29, 2014), <https://www.thefire.org/legislative-rush-campus-sexual-assault-threatens-student-rights/>.

B. Safe Campus Act and Fair Campus Act

Introduced in July, the Safe Campus Act and the Fair Campus Act offer alternative approaches to combating campus sexual assault. Unlike CASA, both bills include meaningful due process protections. While substantially similar, the bills differ in one key way: Under the Safe Campus Act, an institution is precluded from conducting disciplinary hearings regarding allegations of sexual assault unless the complainant reports the allegation to law enforcement. The Fair Campus Act does not include this provision.

Both bills provide accusing and accused students with the right to hire lawyers to actively represent them in the campus hearings and the right to examine witnesses, and both bills require institutions to make inculpatory and exculpatory evidence available to all parties—a requirement that is shockingly absent from many campus disciplinary procedures. The bills reduce conflicts of interest by prohibiting individuals from playing multiple roles in the investigatory and adjudicatory process—preventing, for example, an investigator from serving as an adjudicator. If campuses are to continue to adjudicate sexual assaults, these provisions are obvious and necessary improvements that FIRE supports.

Both bills provide a safe harbor to students who either report or are witnesses to allegations of sexual assault made in good faith, so that they could not be disciplined by their institution for non-violent violations of the student code discovered as a result of investigations into the allegations. This provision will help students come forward with information, to everyone's benefit.

In addition to these important provisions, both bills would repeal the Department of Education's Office for Civil Rights' (OCR) misguided and unlawfully imposed mandate to colleges to use the preponderance of the evidence standard. Doing so would return the decision as to which standard of proof to employ in sexual misconduct hearings to individual states, campus systems, or individual campuses, many of which previously used higher, more appropriate standards such as that of "clear and convincing evidence."

The Safe Campus Act allows the complainant to make the decision as to whether sexual assault allegations should be reported to law enforcement. (FIRE's preference is to require all allegations to be reported.) To encourage more complainants to report allegations to the proper authorities, the bill prohibits institutions from taking action on the complaints unless they choose to report the allegation to law enforcement.

FIRE agrees with the bill's sponsors that punitive interim measures should be waived if a complainant does not report the accusation to law enforcement for investigation. FIRE does recommend, however, that non-punitive interim measures and accommodations be made available regardless of the student's decision to report. While colleges have unsurprisingly proved incapable of competently determining the truth or falsity of felony allegations, they are well-equipped to secure counseling for alleged victims, provide academic and housing accommodations, secure necessary medical attention, and provide general guidance for students who navigate the criminal justice system. Institutions should perform those functions regardless of a complainant's decision to report the incident.

IV. Recommendations

The current approach to campus sexual assault adjudication has failed. Legislation may not be able to bridge the vast competency gap between the capabilities of educational institutions and courts coordinating with law enforcement, but it can prioritize linking complainants with the proper authorities and medical professionals; help reduce bias; provide ample resources for education, prevention efforts and counseling services; set forth a framework for providing students with housing and academic accommodations; give institutions the tools to protect their campuses on an interim basis while the wheels of justice turn; and provide all affected parties with meaningful rights that will help them protect their own interests.

If Congress determines that campus tribunals must continue adjudicating these cases, there are steps that can be taken to improve their effectiveness and fairness. First and foremost, our public policy should encourage reporting allegations to law enforcement authorities and give them the space to conduct their professional investigations without interference.

The government should drop its insistence that institutions use the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. More importantly, the use of this low standard, particularly when decoupled from meaningful due process protections, is unjust. Instead, the government should be encouraging institutions to use the “clear and convincing” standard of evidence, which requires more than just a “50%-plus-a-feather” level of confidence that the evidence supports one side over the other, but less certainty than the criminal courts’ “beyond a reasonable doubt” standard. The government should also encourage institutions that continue to use the preponderance of the evidence standard to add additional due process protections—for example, to provide accused students with a meaningful opportunity for cross-examination in cases where credibility is an issue.

Congress may also improve the reliability and fairness of campus disciplinary hearings by requiring institutions to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant’s interests by bringing and prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function, but this right is typically not extended to student respondents. Notably, the recent passage of the Violence Against Women Reauthorization Act of 2013 included a provision that “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”⁵ The Department of Education has (correctly) interpreted this to include the right to have a lawyer present.⁶ But for this measure to truly make a difference, Congress must make clear

⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

⁶ Violence Against Women Act, 79 Fed. Reg. 62,751 (Oct. 20, 2014).

that the advisor may actively participate in the process. Right to counsel legislation making this change passed with overwhelming bipartisan support in North Carolina and North Dakota. *See* Attachments F and G. Allowing both students to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner.

Congress should also note that statements made by students during on-campus proceedings or in meetings with campus officials are admissible against them in criminal court. By participating without a lawyer, accused students have essentially waived their Fifth Amendment rights. Accused students lucky enough even to recognize this problem are still forced to choose between defending themselves on campus or defending themselves in criminal courts. An example of this dilemma is the case of Ben Casper, a former student at The College of William & Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him at trial, but has been refused the opportunity to return to William & Mary.

Further, there are disturbing signs that university administrators are actively exploiting this issue in order to undermine the Fifth Amendment. In July, Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin–Madison, was quoted bragging to the International Association of College Law Enforcement Administrators that she was able to circumvent due process protections and secure a criminal conviction of a student by using the statements he made during the campus procedures against him in his criminal trial. Speaking candidly, she told her audience, “It’s Title IX, not Miranda. Use what you can.” *See* Attachment H. Requiring institutions to allow legal advocacy in the campus tribunal will go a long way towards fixing this problem.

Participation of legal counsel will also help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the authors of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Congress could also improve campus procedures by prohibiting institutions from allowing individuals to perform multiple roles during the adjudicatory process. Campus advocates should not serve as investigators. Investigators should not serve as adjudicators, and adjudicators should not hear appeals. Preventing the commingling of these responsibilities is an important check that reduces the risk of one person’s bias permeating the entire process. The Safe Campus Act and the Fair Campus Act include provisions to this effect.

Another step Congress may take to ensure that campus tribunals are more effective and fair is to require institutions to include sexual contact with an incapacitated person in their definitions of sexual assault and rape, and to provide an appropriately precise definition of incapacitation. “Incapacitation” is qualitatively different from mere “intoxication.” This is a distinction with a real difference. If one is “incapacitated,” one has moved far beyond mere intoxication; indeed, one can no longer effectively function and thus cannot consent. Courts have recognized that simple intoxication does not necessarily equal incapacitation, and

therefore does not necessarily foreclose consent.⁷ College policies must recognize this distinction, as well, perhaps by mirroring state definitions of incapacitation.

V. Conclusion

Sexual assault is one of the most heinous crimes a person can commit. Those found guilty should be punished to the fullest extent allowed by law. But precisely because sexual assault is such a serious crime, ensuring that each case is referred to law enforcement and providing those accused with due process is absolutely vital. As FIRE President Greg Lukianoff has observed: “Due process is more than a system for protecting the rights of the accused; it’s a set of procedures intended to ensure that findings of guilt or innocence are accurate, fair, and reliable.”⁸

FIRE is under no illusion that there is a simple solution to the problem of sexual assault on campus. But by lowering the bar for finding guilt, eliminating precious due process protections, and entrusting unqualified campus employees and students to safeguard the interests of all involved, we are creating a system that is impossible for colleges to administer, and one that will be even less fair, reliable, and accurate than before. Congress can help reverse this trend by taking all students’ interests into account. To accomplish that, Congress should include the best aspects of each pending bill in a comprehensive, balanced bill.

Thank you for addressing this important issue and for considering FIRE’s input. We are deeply appreciative of this opportunity to share our perspective and offer our assistance to you as you move forward. Please do not hesitate to contact us if FIRE may be of further assistance.

Respectfully submitted,



Joseph Cohn
Legislative & Policy Director
Foundation for Individual Rights in Education

⁷ See, e.g., *Commw. v. Leblanc*, 900 NE.2d 127, 133 (Mass. App. Ct. 2009).

⁸ FIRE RESPONDS TO WHITE HOUSE TASK FORCE’S FIRST REPORT ON CAMPUS SEXUAL ASSAULT, Apr. 29, 2014, <https://www.thefire.org/fire-responds-to-white-house-task-forces-first-report-on-campus-sexual-assault/>.